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opinions from which they quote in support of their conclusion that the declaratory judgment is unconstitutional. The unfortunate effect of the decision is evident by the fact that in the very next case submitted to the Michigan court, involving contested claims of parties under a written lease and hence most appropriate for a declaratory judgment, the declaration sought was denied on the ground that the act authorizing such judgments had been held unconstitutional. It is to be hoped that in the light of further consideration of the subject the court will be persuaded to open the question to argument in another case; if it does, it is hardly to be doubted that a different conclusion will be reached.

E. M. B.

ILLEGITIMATE CHILDREN AS BENEFICIARIES UNDER WRONGFUL DEATH ACTS.

The recent case of *Washington, B. & A. Ry. v. State* (1920, Md.) 111 Atl. 164, again raises the question as to the exact relationship between an illegitimate child and its mother, a wrongful death Act being involved on this occasion. By the Maryland statute,<sup>1</sup> which is almost the same as Lord Campbell's Act, an action may be maintained by the state for the "benefit of the wife, husband, parent, and child of the person whose death shall have been caused," the jury to give such damages as they may think proportionate to the injury resulting from such death, to the parties for whose benefit such action is brought. In this case, an action was brought for the death of a woman, one of the beneficiaries being her illegitimate child. It being necessary to decide, in order to ascertain the relevancy of certain evidence, whether an illegitimate child could recover under the Maryland statute, the court held that an illegitimate child could not recover, as the word "child," when used in a statute, *prima facie* means legitimate child.<sup>2</sup>

The rule adopted by the courts, in construing the word "child" in a statute to mean legitimate child, seems to have no legal or logical basis. At common law, the rule that a bastard was *nullius filius* applied to cases of inheritance,<sup>3</sup> but the ties of nature were binding for many other purposes.<sup>4</sup> When the word "child" is used in an inheritance statute giving certain rights to children, there is reasonable ground for holding that the statute does not confer any rights on an illegitimate child, as under the common law an illegitimate child has no inheritable blood. But when the word "child" is used in a statute which in no way relates to inheritance, this reasoning is not applicable.

<sup>1</sup> Ann. Code Laws of Md. (1911) art. 67.

<sup>2</sup> 5 Am. & Eng. Encyc. (2d ed. 1900) 1095; 7 C. J. 959.

<sup>3</sup> 2 Kent, *Commentaries* (13th ed. 1884) 277; 1 Coke, *Littleton* (1st Am. ed. 1853) sec. 188; 1 Coke, *Law of England* (2d Am. ed. 1836) 116, note F.

<sup>4</sup> 2 Kent, *Commentaries* (13th ed. 1884) 277.

In saying that the rule of construction which it follows is a *prima facie* rule of construction, the court is impliedly asserting that if there were any indication that the legislature intended to include an illegitimate child within the provisions of the statute, it would construe the word "child" to include an illegitimate child. As an illustration, suppose that a state statute provides that children of the same parent cannot intermarry. Would the statute operate so as to prevent illegitimate children of the same parent from intermarrying? If the purpose of the legislature, in enacting the statute, was to prevent the birth of deformed offspring or imbeciles, there is no doubt that the *prima facie* rule of construction would not be applied, since such a purpose would thereby be defeated. The further fact that at common law it was held unlawful for a bastard to marry within the Levitical degrees,<sup>5</sup> would be considered as an indication that the legislature intended to include illegitimate children within the provisions of the statute. What the court is in fact saying in the principal case, then, is that the legislature, by naming "child" as beneficiary, intended to exclude an illegitimate child from its provisions.

It seems that there is no good reason of logic or policy to attribute such an intention to the legislature. The preamble to Lord Campbell's Act,<sup>6</sup> which the Maryland statute closely follows, states the act to be one for *compensating* the families of persons killed by accident. The purpose of the statute is to provide a money substitute for the benefits which the beneficiary could have reasonably expected from the continued life of the deceased.<sup>7</sup> If a mother owes certain duties to her illegitimate child which the law recognizes as arising from the blood relationship, can it be said, when the child is deprived of these rights through the death of its mother, that such a child was not intended to be included as a beneficiary under the statute?

There was doubt in England, whether a mother was under a common-law duty to support her bastard child.<sup>8</sup> By the Poor Laws,<sup>9</sup> however, such a duty was imposed on her. In this country, even in the absence of statute, it has been held that a mother, as the natural guardian of the child, is under a duty to support it.<sup>10</sup> Since the child has a right to support from its mother, there seems to be no principle of public policy or justice upon which the court can base its refusal to

<sup>5</sup> *Hains v. Jeffel* (1695) 1 Ld. Raym. 68.

<sup>6</sup> 9 & 10 Vict. (1846) c. 93.

<sup>7</sup> 17 C. J. 1318, sec. 188, *id.* 1328, sec. 199; Tiffany, *Death by Wrongful Act* (2d ed. 1913) sec. 153; cf. *Ormsbee v. Grand Trunk Western Ry.* (1917) 197 Mich. 576, 164 N. W. 408; *Georgia Ry. & Power Co. v. Beale* (1920, Ga.) 103 S. E. 434.

<sup>8</sup> See *Humphrys v. Polak & Wife* [1901] 2 K. B. 385, 389.

<sup>9</sup> 4 & 5 Wm. IV (1834) c. 76, sec. 71.

<sup>10</sup> *Nine v. Starr* (1879) 8 Ore. 49; 2 Kent, *Commentaries* (13th ed. 1884) 278, 279; see also cases cited in (1920) 15 ILL. L. REV. 215.

let such a child recover. There appears to be but one reason for the court's interpretation of the act, and that is, that by excluding an illegitimate child from the provisions of the act, illicit commerce between the sexes would be discouraged. It is obvious, however, that this remedy will not be particularly effective.

The fact that practically all of our states allow an illegitimate child to inherit from its mother is a further argument for allowing an illegitimate child to recover for her death. Kent says,<sup>11</sup> that this

"rests upon the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity."

It is true that these statutes do not legitimate bastard children, but the effect is to remove practically the only common-law disability of an illegitimate child with respect to its mother.<sup>12</sup> Having clothed illegitimate children with the relationship and attributes of legitimate children, by allowing them to inherit from their mother,<sup>13</sup> it is believed that the legislature intended, by the use of the word "child" in the Wrongful Death Act, to include illegitimate children as parties entitled to be beneficiaries of the action, in so far as they claim with reference to their mother. Legislation reflects the mores of the times, and to interpret a statute so as to make it retrogressive, is to defeat the purpose of legislation.

The decision in the principal case seems also to be against the weight of authority, as represented by two cases which are analogous. In *Quinones v. American Ry. of Porto Rico*<sup>14</sup> two illegitimate children brought an action for the death of their father under the Employer's Liability Act, which named "children" as beneficiaries. The father under Porto Rican law was under a duty to support and educate his bastard children, and the court held that it would be too narrow to hold that the word "children," in the statute, did not include illegitimate children.<sup>15</sup> In *Galveston, H. & S. A. Ry. v. Walker*,<sup>16</sup> where two illegiti-

<sup>11</sup> 2 Kent, *Commentaries* (13th ed. 1884) 277.

<sup>12</sup> *Smith v. Garber* (1918) 286 Ill. 67, 121 N. E. 173.

<sup>13</sup> Ann. Code Laws of Md. (1911) art. 46, sec. 30.

<sup>14</sup> (1908) 4 Porto Rico Fed. 254.

<sup>15</sup> The only case that comes near to being an authority against *Quinones v. American Ry. of Porto Rico*, *supra*, is the decision in *Good v. Towns & Sullivan* (1883) 56 Vt. 410, where an illegitimate child, actually dependent on its father, brought an action under a statute giving a right of action to one dependent on a person, whose death was caused by intoxication from the use of liquor unlawfully sold. The court held that "dependent," as used in the statute, meant a legal dependency, and as a father was not under a legal duty to support his illegitimate child, then the plaintiff could not recover. This case, however, is no authority for refusing a recovery where the parent is under a legal duty to support his bastard child. In *Roberts v. Whaley* (1916) 192 Mich. 133, 158 N. W. 209, illegitimate children, living with their father, brought an action for his death under

mate children sued for the death of their mother, the court held that in view of the fact that illegitimate children could inherit from their mother, and that a mother was under a duty to support her illegitimate children, the legislature intended to include illegitimate children within the provisions of the statute, and they were allowed to recover. The many cases which hold that a mother cannot recover for the death of her illegitimate child,<sup>17</sup> even in jurisdictions where a mother and her illegitimate child can inherit from each other, do not seem to be authority for refusing an illegitimate child a recovery for the death of its mother. To let an immoral parent recover, would resemble a case of letting one profit from his own wrong, but to refuse an illegitimate child a recovery, would be punishing it for a wrong for which it was in no way responsible. Public policy demands a liberal construction of the word "child" when an innocent child is the plaintiff, both to protect the child and to prevent it from becoming a public charge. Cases allowing a mother to recover for the death of her illegitimate child<sup>18</sup> are authority, of course, for letting an illegitimate child recover for the death of its mother.

The principal case is the first to refuse to an illegitimate child a recovery for the death of its mother. In view of the authorities and some recent legislation,<sup>19</sup> there is little doubt that the courts would hesitate to follow this interpretation.

the Workmen's Compensation Act, which named "dependents" as beneficiaries. The court held that the deceased was under a legal and moral duty to support his illegitimate children and that they were clearly within the meaning of the statute. See also (1919) 28 YALE LAW JOURNAL, 518. It may also be observed that the principal case is much stronger than that of *Quinones v. American Ry. of Porto Rico*, *supra*. There, illegitimate children recovered for the death of their father, while in the principal case an illegitimate child sought to recover for the death of its mother.

<sup>16</sup> (1907) 48 Tex. Civ. App. 52, 106 S. W. 705.

<sup>17</sup> *Harkins v. Philadelphia & Reading Ry.* (1881, Pa. C. P.) 15 Phila. 286; *Robinson v. Georgia Ry. & Banking Co.* (1903) 117 Ga. 168, 43 S. E. 452; *Lynch v. Knoop* (1907) 118 La. 611, 43 So. 252; *McDonald v. Southern Ry.* (1904) 71 S. C. 352, 51 S. E. 138.

<sup>18</sup> *Marshall v. Wabash Ry.* (1894) 120 Mo. 275, 25 S. W. 179; *Andrzejewski v. Northwestern Fuel Co.* (1914) 158 Wis. 170, 148 N. W. 37; *Hadley v. City of Tallahassee* (1914) 67 Fla. 436, 65 So. 545, Ann. Cas. 1916 C, 719, note.

<sup>19</sup> The trend of the law on the subject, as well as the probable intent of the legislature, may be illustrated by examining the decisions and legislative enactments in the state of South Carolina. In *McDonald v. Southern Ry.*, *supra*, decided in 1904, the court refused to let a mother recover for the death of her illegitimate child. In 1906, the legislature passed an act stating that in the event of the death of such illegitimate child, or the mother of an illegitimate child, by the wrongful act of another, the mother, or the illegitimate child, should have the same rights and remedies as though such illegitimate child had been born in lawful wedlock. *Croft v. Southern Cotton Oil Co.* (1909) 83 S. C. 232, 65 S. E. 216, allowed a mother to recover for the death of her illegitimate child.